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Recent Cases

TRUSTS—MISSOURI—PRECATORY WORDS—EFFECT ON ABSOLUTE INTEREST IN PREVIOUSLY GRANTED ESTATE

*Thompson v. Smith*¹

The second paragraph of the will involved in this case stated, "All the rest, residue and remainder of my estate . . . I hereby will, devise and bequeath to my beloved wife, Jessie H. Thompson." The third paragraph provided, "It is my wish and desire that . . . my widow . . . will . . . that part of the property which she has inherited from my estate that may be left at the time of her decease to my heirs, as I feel like it should be nothing more than fair and just." A decree construing the will as devising a fee simple absolute to the widow, free of trust, was affirmed.

The devise of an interest in fee followed by precatory words which conflict with the absoluteness of the estate has long been a source of trouble in the courts. The problem in these cases is the effect to be given to the testator's expression of desire.² According to the earlier view it was laid down as a rule of law that if the testator expressed a desire³ that a certain disposition should be made of the property this was sufficient, in the absence of peculiar circumstances, to create a trust.⁴ The question was merely whether the testator desired that the legatee should make a particular disposition of the property. The more recent cases, on the other hand, find no trust unless the testator manifests an intent to impose a legal obligation upon the legatee to make the desired disposition of the property.⁵ These cases have expressed disapproval of the earlier rule,⁶ and have called attention to the fact that its application frequently defeated what was evidently the real intention of the testator.⁷

1. 300 S.W.2d 404 (Mo. 1957).

2. 1 Scott, TRUSTS § 25 (2d ed. 1956).

3. Annot., 49 A.L.R. 10 (1927) (rule attributed to the historical fact that originally all trusts, no matter how expressed, were only of precatory force, and imposed no binding obligation, so that it was natural and appropriate that words of recommendation, desire, entreaty, and confidence should be used).

4. See *Harding v. Glyn*, 1 Atk. 469, 26 Eng. Rep. 299 (Ch. 1739) (widow took property in trust for husband's relatives despite absolute devise because he "did desire her . . . to give" such property to such of his relations as she should think most deserving and approve of).

5. 1 Scott, TRUSTS § 25 (2d ed. 1956).

6. See *In re Hill*, [1923] 2 Ch. 259 (criticism of earlier cases); *Green v. Marsden*, 1 Drew. 646, 650, 61 Eng. Rep. 598, 599 (Ch. 1853). In the latter case, the testator devised an estate to his widow, "begging and requesting" that she should bequeath what remained to members of her own and his family as she should think most deserving. The court found an absolute estate in the widow and said, "regretting that the principle [presumption in favor of trust] was ever established, I shall not extend it one step further than it has already gone."

7. Compare *Crockett v. Crockett*, 2 Ph. 553 (1847) (trust imposed in favor of children where testator directed that all his property should be "at the disposal of his wife for herself and children") with *Lambe v. Eames*, L.R. 6 Ch. 597 (1871) (no trust intended where gift was to wife to be at her disposal in any way she might think best "for the benefit of herself and family").

The majority view now is that precatory words are given only their natural import.⁸ The result is that words of request and entreaty indicate no more than their usual meaning unless the context of the will or the circumstances show that the testator meant to leave the legatee with no option.⁹ The technique adopted by the *Restatement of Trusts*, in proposing that the words used be considered in conjunction with seven criteria,¹⁰ gives fullest effect to the intention of the settlor. A possible objection to this method of construction is that it makes the effect of language uncertain until judicially interpreted.¹¹

There has been some confusion in Missouri on this problem. Shortly before the turn of the century the Missouri decisions followed a modification¹² of the earlier English view that precatory language presumptively imports an intention to create a trust,¹³ even where there was a power of disposition in the first taker.¹⁴ Between 1912 and 1915 four decisions came down against construing precatory language as manifesting an intention to create a trust¹⁵ but, as distinguished,

8. *Springs v. Springs*, 182 N.C. 484, 109 S.E. 839 (1921).

9. *In re Brown's Estate*, 175 Cal. 361, 165 Pac. 960 (1917).

10. *RESTATEMENT, TRUSTS* § 25, comment b (1935) ("(1) The imperative or precatory character of the words used; (2) the definiteness or indefiniteness of the property; (3) the definiteness or indefiniteness of the beneficiaries or the extent of their interests; (4) the relations between the parties; (5) the financial situation of the parties; (6) the motives which may reasonably be supposed to have influenced the settlor in making his disposition; [and] (7) whether the result reached by construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce").

11. 39 *YALE L.J.* 1072, 1074 (1930) (such uncertainty may encourage litigation of all claims).

12. *Schmucker's Estate v. Reel*, 61 Mo. 592, 596 (1876) ("the prevailing doctrine is, that no particular form of expression is requisite in order to create a valid and binding trust; and that words of recommendation, request, entreaty, wish or expectation, will impose a binding duty upon the devisee by way of trust, provided the testator has pointed out with sufficient clearness and certainty both the subject matter and the object of the trust").

13. See *Murphy v. Carlin*, 113 Mo. 112, 20 S.W. 786 (1892) (trust imposed where will provided, "it is my will and desire that my wife continue to provide for the care, comfort and education of T.J.M."); *Noe v. Kern*, 93 Mo. 367, 369, 6 S.W. 239, 241 (1887) (trust imposed where testatrix gave absolute estate to husband "in full faith" that he would properly provide for the two minor children whom they had undertaken to raise and educate).

14. *Lewis v. Pitman*, 101 Mo. 281, 293, 14 S.W. 52, 54 (1890). Testator gave his wife the sole right to carry on his manufacturing business, and the right to sell the patent rights and trademarks of the business. In a subsequent clause he declared, "It is my desire that after my wife's death all of my children shall share, and share alike in the estate." In holding that wife took a life estate only, the court said, "There may be . . . cases . . . where the added power of disposition will turn the scale, but if it is the intention of the testator . . . notwithstanding the power of disposition, then that intention ought to prevail."

15. *Lemp v. Lemp*, 264 Mo. 533, 175 S.W. 618 (1915) (absolute estate in wife where will expressly declared that testator gave nothing to children or grandchild, and contained an expression of confidence that wife would do the best for them); *Hayes v. Hayes*, 242 Mo. 155, 145 S.W. 1155 (1912) (no trust imposed where testator devised land to one of his sons, telling him orally that he hoped he would divide it with two other sons); *Snyder v. Toler*, 179 Mo. App. 376, 378, 166 S.W. 1059, 1060 (K.C. Ct. App. 1914) (absolute estate in wife who was given all of testator's property, "knowing she will deal properly with" his grandchild and son; *Noe v. Kern*, *supra* note 13, distinguished, as here the grandchild and son were adults and not

these had questionable effect on the rule of the earlier cases. The modern rule was stated to be:

In order to imply a trust from the use of precatory words, the terms employed for that purpose must be inserted in the will or other instrument of settlement, and used in an imperative sense as to a certain subject and a certain object or person.¹⁶

In 1936 it was again held that precatory words can impress a trust upon the first taker¹⁷ and shortly thereafter precatory language was considered in two other decisions¹⁸ although these did little to clarify the rule. From this there might have been anticipated a resurgence of the old view, but the most recent cases¹⁹ have failed to find any limitation imposed by precatory words on grounds that a power of disposition is consistent only with an absolute estate.

Under the present state of the law an interest in fee can be cut down only by a subsequent clear and unequivocal expression of intention to create a trust.²⁰ Thus if an intended mandatory meaning is found from the context and the circumstances²¹ it will be so construed, but a power of disposition in the first taker is inconsistent with a mere beneficial life estate.²² It is to be hoped and expected that Missouri has accepted the modern rule permanently and will continue to follow it in accordance with the true intention of the testator.

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dependent upon testator); *In re McVeigh's Estate*, 181 Mo. App. 566, 164 S.W. 673 (St. L. Ct. App. 1914) (bequest absolute where testator's wife received \$25,000 and a subsequent clause provided for \$1 to the son, stating that testator thought it best to give the legacy to the mother to enable her to supply her son's needs according to her discretion).

16. *Hayes v. Hayes*, *supra* note 15, at 170, 145 S.W. at 1159.

17. *Blumer v. Gillespie*, 338 Mo. 1113, 1114, 93 S.W.2d 939, 940 (1936) (precatory words expressed testator's intention to impose a trust where testator devised residue of estate to wife and provided in the same paragraph that it was his "idea and wish" that their son should inherit what might remain after wife's death).

18. *Bolte v. Bolte*, 347 Mo. 281, 147 S.W.2d 441 (1941) (trust imposed where testator requested that wife should have no right to give or sell any of the property, and provided that after wife's death all the property should go to the Catholic church); *English v. Ragsdale*, 347 Mo. 431, 147 S.W.2d 653 (1941) (trust imposed where testator desired that wife take as her absolute property, and desired that wife should dispose of all the property she might have at the time of her death equally between their two nieces).

19. *Thompson v. Smith*, *supra* note 1; *Housman v. Lewellen*, 362 Mo. 759, 244 S.W.2d 21 (1951) (en banc) (testator requested and directed that wife should divide any remainder left at her death among certain relatives and court held that wife's power of disposition indicated testator's request was not mandatory); *Vaughan v. Compton*, 361 Mo. 467, 235 S.W.2d 328 (1950) (absolute estate in husband where testatrix gave residue of estate to husband and in subsequent paragraph made specific disposition to others of all that remained at husband's death).

20. *Housman v. Lewellen*, *supra* note 19, at 765, 244 S.W.2d at 24 ("the devise of a fee in terms, or by words necessarily describing an absolute estate . . . cannot be annulled except by later language in the will, which expressly or by necessary implication, arising from words equally clear and conclusive as those in granting the fee, cuts down the previous devise of the fee").

21. See *Bolte v. Bolte*, *supra* note 18. This decision was approved in *Thompson v. Smith*, *supra* note 1.

22. *Thompson v. Smith*, *supra* note 1 (in effect overruling *Blumer v. Gillespie*, *supra* note 17); *Housman v. Lewellen*, *supra* note 19; *Vaughan v. Compton*, *supra* note 19.

